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**No. 90-256**

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**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1990**

**G. RUSSELL CHAMBERS,**

**Petitioner**

**Versus**

**NASCO, INC.,**

**Respondent**

**ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**RESPONDENT'S BRIEF IN OPPOSITION**

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## **QUESTIONS PRESENTED FOR REVIEW**

1. Given that a United States District Court possesses the inherent power to sanction parties for egregious misconduct in the course of litigation that is obstructive of justice, is the arsenal of available sanctions restricted by state law when the court sits in diversity?
2. Is the sanction imposed in this case appropriate in light of the egregious misconduct giving rise to the sanction?

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**RULE 29.1 STATEMENT**

The following entities are subsidiaries of the respondent, NASCO, Inc.:

1. NASCO Holdings, Inc., a Tennessee corporation;
2. NASCO Real Estate, Inc., a Tennessee corporation;
3. Chalk-Line, Inc., an Alabama corporation;
4. NASCO Data Systems, a Tennessee corporation;
5. Johnson/Rudolph Training Development, Inc., a Kentucky corporation;
6. Channel Communications of Lake Charles, Inc., a Louisiana corporation;
7. Venture Mark, Inc., a Tennessee corporation;
8. BAYLY Corporation, a Delaware corporation;
9. NASCO Advanced Solutions, a Tennessee corporation;
10. Source One Corporation, a Tennessee corporation;
11. NASCO Northcreek, Inc., a Tennessee corporation;

12. NASCO Otterwood, Inc., a Tennessee corporation;
13. Northfield Lodge, Inc., a Tennessee corporation;
14. Channel Communications, Inc., a Tennessee corporation.

## COUNTERSTATEMENT OF THE CASE

From the affirmance of a judgment imposing sanctions, the defendant-petitioner, G. Russell Chambers, seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. This brief is respectfully submitted on behalf of the plaintiff-respondent, NASCO, Inc., in opposition to that petition.

### *A. The Nature of the Case*

The challenged sanction was imposed in response to a motion filed by the plaintiff, NASCO, Inc. (NASCO). The respondents were G. Russell Chambers (Chambers), Mabel Christine Baker (Baker), and their counsel, A.J. Gray III (Gray), Edwin A. McCabe (McCabe), Richard A. Curry (Curry), and Gary L. Boland (Boland).

The motion arose out of an action in diversity for the specific enforcement of a Purchase Agreement providing for the sale of television station KPLC-TV in Lake Charles, Louisiana. NASCO was the purchaser. The defendants in the underlying action were Calcasieu Television and Radio, Inc. (CTR), the owner and defaulting seller; Chambers, the sole shareholder and sole director of CTR, who caused CTR to breach the Agreement; and Baker, Chambers' sister and trustee of the Facility Trust, an entity created by Chambers to receive simulated ownership of certain station properties in an attempt to avoid the entry of a TRO preserving the *status quo* and to prevent the judicial enforcement of the sale.

### *B. The Factual Context*

Chambers does not so much misstate, as ignore, the factual context from which the challenged sanction arises.

A telling omission. For the nature of this case cannot be understood without an appreciation of the scope and malignancy of the misconduct to which the district and appellate courts below responded in imposing sanctions. That context is set forth in the district court's Findings of Fact, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 123-37 (W.D. La. 1989), Petitioner's App., 4-38. Those Findings were affirmed by the Fifth Circuit on appeal. NASCO hereby adopts those findings as its Counterstatement of the factual context of this case.

### C. The Proceedings Below

NASCO's sanctions motion was filed on December 29, 1987, following the settlement of its claim for equitable adjustments for the delays incurred as the result of Chambers' breach. An evidentiary hearing was held on April 11, 1988. All parties were given the opportunity to brief the legal and factual issues raised, and to submit documentary evidence, affidavits, and testimony. All parties availed themselves of that opportunity to the extent they deemed appropriate.

On January 23, 1989, the district court granted NASCO's motion. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120 (W.D. La. 1989), Petitioner's App., 1-58. Chambers was ordered to pay NASCO the sum of \$66,286.85 in appellate sanctions<sup>1</sup> and \$996,644.65 in sanctions for the manner in which the defense of the action was conducted. For the same pattern

<sup>1</sup> The trial court's fixing of the amount of the appellate sanctions awarded by the Fifth Circuit was not appealed by Chambers, and is, therefore, not at issue on this petition.

of abusive conduct, his lawyers were disbarred or suspended.<sup>2</sup> Baker was reprimanded.

On Chambers' appeal, the Fifth Circuit affirmed, holding that the district court possessed the inherent power to sanction a party for such misconduct, and that the sanction imposed was appropriate in light of the egregious misconduct which had occurred. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990), Petitioner's App., 59.

Chambers now seeks certiorari in an attempt to overturn that decision.

### SUMMARY OF ARGUMENT

The instant petition for certiorari should be denied. The decision of the lower appellate court is correct.

As an essential element of their very existence, federal district courts have the inherent power to regulate and control the conduct of litigants and lawyers appearing before them and, concomitantly, the power to levy appropriate sanctions against both for abuses of the judicial process. Those sanctions may include the assessment of the attorneys' fees and expenses incurred by the aggrieved party in combating the abusive tactics. That inherent power exists regardless of the source of jurisdiction or the substantive rule of decision in a particular case.

<sup>2</sup> Gray was disbarred from the Western District, and was prohibited from applying for readmission for a period of three years. McCabe was severely reprimanded and declared ineligible to practice in the Western District for a period of five years. Curry was suspended from practice in the Western District for a period of six months. Boland was not sanctioned.

The severity of the sanction imposed pursuant to a court's inherent power should be tailored to the gravity of the misconduct it seeks to redress. Where misconduct constitutes a systematic program of abuse embodying a fraud upon the court, it is appropriate and fitting that the entire cost of the proceedings be assessed as sanctions. In that context, the guidelines set forth in such cases as *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), simply have no application.

### REASONS FOR DENYING THE WRIT

This case presents no "special and important reasons" warranting review on writ of certiorari. Sup. Ct. R. 10.1. It is nothing more and nothing less than a case of unparalleled misconduct reaping an apt reward.

The defense mounted in this action was initiated by a deliberate act of fraud upon the court—a fraud designed to create the *appearance* that the subject properties had been sold to a third party, when in fact no sale had taken place and all ownership and control remained vested exclusively in Chambers. The immediate objective was to deceive the district court into believing it was powerless to preserve the *status quo*. The ultimate objective was to deceive that court into believing it was powerless to grant specific performance. That initial fraud literally *manufactured* the frivolous Public Records Doctrine argument ultimately relied upon by Chambers as his sole defense to NASCO's suit.

Following the initial fraud, Chambers and his counsel pursued a defense strategy designed to delay the inevitable transfer of the station for as long as possible, and to make the prosecution of this action as financially punishing to NASCO as human ingenuity could make it. The single,

overriding objective of that strategy was to render the vindication of NASCO's rights too costly to pursue.

That fraud, and the defense strategy that followed, was a calculated and deliberate assault upon the jurisdiction of the district court. It was for that extended, systematic program of abusive tactics that NASCO sought sanctions. It was for that program of systematic abuse that sanctions were awarded.

### A. Inherent Power

The challenged sanction was imposed under the aegis of the district court's inherent power.<sup>3</sup>

<sup>3</sup> In seeking sanctions, NASCO invoked the provisions of 28 U.S.C. § 1927 and Fed. R. Civ. P. 11, as well as the district court's inherent power.

But those statutory provisions are highly particularized and narrow in their reach.

Rule 11 was promulgated for the purpose of checking abuses in the signing of papers filed in the course of litigation. Violation of the Rule mandates the imposition of appropriate sanctions against the signing and/or represented party. In terms, however, it does not apply to *any* misconduct by *any* individual that does not involve the signing of a specific paper in violation of the Rule's certification requirements—no matter how egregious, no matter how fraudulent, that misconduct might be.

The misconduct addressed by § 1927 is much broader. It applies to the unreasonable multiplication of proceedings. But the targeted malefactors are much more limited—only attorneys, *not* parties, may be sanctioned. Thus, § 1927 on its face cannot apply to *any* misconduct by *any* individual who is not an attorney—no matter how egregious, no matter how fraudulent, that misconduct might be.

Neither Rule 11, nor § 1927, nor both combined, would seem to provide a basis for assessing sanctions against Chambers for his role in the

Contrary to Chambers' assertions, the appellate court below did not chart "a bold new course for the federal judiciary," and did not depart from well established precedent.

That federal district courts have inherent powers—powers vested in them upon their creation, and by virtue of their function—is recognized in the jurisprudence of this Court dating back to the early 19th Century. See, e.g., *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L. Ed. 259, 260 (1812).

Such inherent powers must, as a matter of strict functional necessity, encompass the power to regulate and control the conduct of parties and their counsel:

Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions. If such power did not exist, or if its exercise were somehow dependent upon the actions of another branch of government or upon the entitlement of a private party to injunctive relief, the independence and constitutional role of Article III courts would be endangered.

*In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984), cited with approval in *In re McDonald*, 489 U.S. \_\_\_, \_\_\_

Footnote 3 continued.

confection and perpetration of the fraudulent sale and leaseback scheme—even though that scheme constituted a deliberate fraud upon the court—because he is not a lawyer, and because that malefaction did not involve the signing of papers filed in conjunction with this litigation.

The inherent power of a federal district court is not so restricted.

n.8, 109 S. Ct. \_\_\_, \_\_\_ n.8, 103 L. Ed. 2d 158, 165 n.8 (1989). Implicit in the power to regulate and control conduct is the concomitant power to levy appropriate sanctions for abusive litigation tactics. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67, 100 S. Ct. 2455, \_\_\_, 65 L. Ed. 2d 488, 500-01 (1980); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 870 n.3, 875 (5th Cir. 1988) (*en banc*). See *Batson v. Neal Spelce Associates, Inc.*, 805 F.2d 546, 550 (5th Cir. 1986); *Huddleston v. Hermann & MacLean*, 640 F.2d 534, 559-60 (5th Cir. 1981). See also *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, \_\_\_, 8 L. Ed. 2d 734, 738 (1962); *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 520-21 (9th Cir. 1983); *McCandless v. Great Atlantic & Pacific Tea Co., Inc.*, 697 F.2d 198, 200 (7th Cir. 1983). Indeed, the use of inherent judicial power to impose monetary sanctions has been recognized as particularly appropriate when parties have practiced a fraud upon the court:

No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where "for dominating reasons of justice" a court may assess counsel fees as part of the taxable costs.

*Universal Oil Products Co. v. Root Ref'g Co.*, 328 U.S. 575, 580, 66 S. Ct. 1176, \_\_\_, 90 L. Ed. 1447, 1452 (1946). See *Eppes v. Snowden*, 656 F. Supp. 1267, 1277-79, 1281-82 (E.D. Ky. 1986). See also, e.g., *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S. Ct. 997, \_\_\_, 88 L. Ed. 1250, 1255 (1944); *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); *United Business Communications v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1187 (D. Kan. 1984).

Thus, the inherent power is there. It does not derive from the contempt power. *Cammer v. United States*, 350 U. S. 399, 408 n.7, 76 S. Ct. 456, 460 n.7, 100 L. Ed. 474, 479 n.7 (1956); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 565-66 (3d Cir. 1985). And it is part and parcel of the district court's inherent power to fashion appropriate sanctions in the face of abusive litigation practices. See, e.g., *Kendrick v. Zanides*, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985) (*per* Schwarzer, J.) (invoking Rule 11, § 1927, and inherent judicial power to impose sanctions including compensatory fees and costs).

#### B. *Erie* and the Inherent Judicial Power

Chambers does not argue that the district court below lacks the inherent power to regulate the conduct of litigants before it. He does not argue that the district court lacks the inherent power to levy sanctions against litigants in response to abusive litigation tactics that are obstructive of justice. He does not argue that the district court lacks the inherent power to sanction *him*. Indeed, he does not even argue that the district court lacks the inherent power to impose a sanction that includes an award of the attorneys' fees reasonably incurred in responding to his misconduct. He argues only that, under the *Erie* Doctrine, such a sanction cannot include *all* of NASCO's attorneys' fees because Louisiana law does not permit awards of attorneys' fees absent express contractual or statutory provisions therefor.

Chambers' argument misses the point.

He presents his case in an absolute contextual vacuum, thereby attempting to sterilize it of the malignant conduct which tainted the proceedings below and provoked the sanction he now bemoans. That sterile atmosphere

invites his mischaracterization of this matter as a "fee-shifting" case in which a diversity court must look to state law for authority to award attorneys' fees to successful litigants.

But this is not a fee-shifting case. It is a *sanctions* case. Doubtless, the remedies available for breach of contract are, and should be, governed by the law of Louisiana. But the sanction at issue on this petition was not a remedy for breach of contract. It was not an element of relief on the underlying cause of action. It was a *sanction*. A sanction levied in response to systematic abuses of process running the gamut from delay to outright fraud, abuses designed to manipulate and to obstruct the very machineries of justice, abuses constituting a direct frontal assault on the district court's power to adjudicate.

No less than the contempt power, the inherent power to regulate the conduct of parties before the court arises from the nature of the court, as *court*, and is necessary to the exercise of all other powers. It is a matter of strict functional necessity. See *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562 (3d Cir. 1985). Such power is essential to the administration of justice, and is absolutely essential to the functioning of the judiciary itself. *Id.* at 563. Without it, no federal district court can fulfill its "constitutional obligation to protect [its] jurisdiction from conduct which impairs [its] ability to carry out Article III functions." *In re Martin-Trigona*, *supra*, 737 F.2d at 1261.

The exercise of such inherent power, regardless of the type of sanction imposed, does not, and cannot, implicate the *Erie* Doctrine. If the district court below is imbued with the inherent power to impose *some* sanction upon Chambers for his malignant conduct, then Chambers' argument is merely that *Erie* forecloses, not *all*, but only

this particular, sanction. A dubious proposition at best.

The *Erie* rule seeks to discourage forum shopping and to prevent the inequitable administration of laws.

The exercise of inherent power by the district court below to vindicate the sanctity of its proceedings and its very power to adjudicate does not foster the forum shopping *Erie* was designed to prevent. As a practical matter, litigants do not shop forums on the basis of what arsenal of sanctions is available to punish miscreant litigants and lawyers, any more than they file suit in federal court (or remove to federal court) in order to obtain the benefits of Rule 11 or § 1927.

Nor does the exercise of such inherent power foster the inequitable administration of laws. At bottom, *Erie* promises a diversity litigant that if he prosecutes or defends a state law claim in federal court, and abides by the rules of that court, the result in his case will be the same as if it had been brought in state court. It does not promise him that he may lay waste to the orderly processes of justice, even in the unlikely event that a state court would permit him to do so.

On a more fundamental policy level, the federal interest—rising to the level of a constitutional obligation—in defending federal judicial proceedings against conduct designed to systematically eviscerate a federal court's very power to adjudicate is manifest. The State of Louisiana has no conceivable interest whatsoever in regulating or limiting the panoply of sanctions available to a federal district court in its efforts to fulfill that constitutional obligation.<sup>4</sup> Why,

<sup>4</sup> *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), is not to the contrary.

indeed, should the ability of a district judge to fashion an appropriate sanction for egregious misconduct in federal court be made to vary depending upon what state he sits in, or what state's law happens to govern the underlying substantive claim? Why should a federal court's power to redress abuses of federal process be made in any way subservient to Louisiana policies concerning the availability of substantive remedies for breach of contract? Why should state policy be permitted to strip a federal diversity court of sanctions it could wield in another type of case? Those questions answer themselves. Federal courts do not sit as eunuchs, impotent to protect themselves from abusive conduct, merely because they sit in diversity.

The sanction imposed on Chambers below was based solely and squarely on his egregious and relentless misconduct in the district court proceedings. The district court did not shift fees. It *sanctioned*. That sanction was not a matter of remedy. It was a matter of vindicating judicial authority and the sanctity of the judicial process itself.

Footnote 4 continued.

*Alyeska* was a fee-shifting case in which the prevailing parties sought to recover their attorneys' fees on a "private attorney general" theory. It was not a sanctions case, and did not involve the imposition of sanctions for systematic abuses of process, assaults upon the jurisdiction of the court, or misconduct embodying a fraud upon the court. The *Alyeska* dictum relied upon by Chambers simply observes that, in an ordinary diversity case, where there are no countervailing federal policies or considerations, fee-shifting requests should be governed by state law. *Id.*, 421 U.S. at 259 n.31, 95 S. Ct. at \_\_\_\_ n.1, 44 L. Ed 2d at 154 n.31. That dictum in no way implies that the arsenal of sanctions available to a federal district court for the vindication of its authority should expand and contract depending on the basis of its jurisdiction.

At bottom, the instant case, which *does* involve the imposition of sanctions for egregious misconduct, is *not* an ordinary diversity case, *does not* involve fee-shifting, and *does* implicate federal policies and considerations of the highest gravity.

*Erie* does not require a federal district court to tolerate abuses in diversity cases that it would not tolerate in other cases. *Erie* does not restrict the range of appropriate sanctions available to vindicate the authority of a federal district court merely because the underlying claim sounds in diversity.

As the court in *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14 (S.D.N.Y. 1980), noted:

Since it is the federal judicial process that has been abused a federal court should be able to deal with the abuse as it sees fit regardless of the power of the courts of the state where it sits.

*Id.* at 20 n.12 (diversity case applying New York law). See also *Sterling Energy, Ltd. v. Friendly Nat'l Bank*, 744 F.2d 1433, 1435 n.2 (10th Cir. 1984); *Montgomery Ward & Co. v. Pacific Indem. Co.*, 557 F.2d 51, 61 (3d Cir. 1977) (Gibbons, J., concurring); *Tedeschi v. Smith Barney, Harris, Upham and Co., Inc.*, 579 F. Supp. 657, 660-61 (S.D.N.Y.), *aff'd* 757 F.2d 465 (2d Cir. 1985).

Simply put, it is not the business of the State of Louisiana to police the conduct of parties in federal courtrooms. And Chambers cites no authority from this Court to suggest otherwise.

### C. The Sanction

Chambers next challenges the sanction itself on several fronts, characterizing it as an abuse of the district court's inherent power.<sup>5</sup>

<sup>5</sup> In essence, these arguments assert mere error in the imposition of the sanction and its affirmance by the lower appellate court. Such is not the

### 1. Timeliness.

He first contends that it was untimely. By only *warn- ing* him repeatedly that his conduct was offensive, he argues, the district court lulled him into believing he had not yet sunk to a sanctionable level. To *deter* him, he says, that court should have sanctioned him earlier.

In retrospect, it is impossible to disagree with the suggestion that Chambers should have been sanctioned earlier. But there is nothing whatsoever in the record or the history of these proceedings to suggest it would have done any good.<sup>6</sup>

To the extent Chambers argues that the trial court erred in deferring the sanctions proceeding to the end of the litigation, he is clearly wrong. See, e.g., *Cooter & Gell v. Hartmarx Corp.*, No. 89-275, slip op. at 9 (U.S. June 11, 1990).

Be that as it may, the timeliness issue Chambers urges derives from *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (*en banc*), in which the

Footnote 5 continued.  
stuff of certiorari:

The jurisdiction [to bring up cases by certiorari] was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.

*Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S. Ct. 531, \_\_\_, 67 L. Ed. 922, 924 (1954).

<sup>6</sup> Indeed, Chambers to this day characterizes the findings of the district court as "a scurrilous attack" with "absolutely no basis in fact." Petition For Writ of Certiorari, p.18 n.4. *Scurrilous?* That unrepentant adjective hardly suggests he is deterred even yet.

court concluded that, because Rule 11 permits an award of reasonable attorneys' fees, a party seeking such a sanction has the duty to mitigate his damages by correlating his response to the merits of the offending paper, and by timely notifying the court and the offending party of the alleged Rule 11 violation. *Id.* at 879, 884. Thus, the timeliness requirement is one of timely *notice*—notice of the alleged violation—not the filing of a sanctions motion, not the commencement of a sanctions proceeding, not the imposition of sanctions.

And Chambers had plenty of notice, as he readily admits.<sup>7</sup>

Moreover (and contrary to Chambers' representations to this Court) the district court's work was not com-

<sup>7</sup> He had notice on October 24, 1983—seven days after this suit was filed—when NASCO filed its Amended Complaint, characterizing the bogus sale and leaseback scheme as a deliberate fraud upon the court. He had notice in December 1983, when NASCO sought contempt sanctions against him. He had notice in March 1984, when the district court imposed contempt sanctions, referencing his manifest bad faith. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 120-21, 122 (W.D. La. 1984). He had notice when the district court expressly questioned the defendants' good faith in the status conference of December 17, 1984. He had notice when the district court denied his recusal motion in January 1985, characterizing his supporting affidavit as rank hearsay, rumor, and gossip interlaced with innuendo, and again recited the bad faith conduct of the defense. He had notice in April 1985, when the district court disseminated draft copies of Judge Schwarzer's article on Rule 11 sanctions, with a direct warning to counsel. He had notice when NASCO informed the court and counsel that it was requesting the court to retain jurisdiction following the rendition of judgment for the express purpose, *inter alia*, of enabling that court to determine the issue of attorneys' fees pursuant to Rule 11.

The list goes on.

Chambers was warned repeatedly. In chilling terms. In terms calculated to hit home, and to hit home hard. He simply refused to be deterred.

pleted when it finished the specific performance trial in 1985. There remained the inevitable appeals and their attendant requests for stays to the trial court, the Fifth Circuit, and the Circuit Justice. There remained two additional contempt motions pertaining to Chambers' shenanigans at the FCC. There remained NASCO's motion for judicial assistance in closing the sale—provoked by Chambers' recalcitrance in conveying the properties NASCO had contracted to purchase—which required an evidentiary hearing more elaborate than the merits trial itself. There remained the closing of the sale, an arduous task requiring the supervision of the district court. And there remained the disposition of NASCO's claim for equitable adjustments for delay. Given the delays encountered in disposing of what should have been a simple lawsuit, the district court was understandably focused on the disposition of these substantive matters. It had little time for collateral issues. Recognizing that, the court in a series of status conferences with counsel determined that the sanctions issue would await the completion of the substantive claims.

All in all, the deferral of the sanctions issue was calculated to exert the maximum pressure possible on Chambers to curb his offensive tactics during the remainder of the action. But Chambers was undeterrable. The instant sanction is but the fruit of that recalcitrance.

There is no issue as to the timeliness of the challenged sanction.

## 2. Tailoring.

Chambers would suggest that the sanction was not tailored to his wrongful conduct.

On the contrary, it is a perfect fit.

The quantum of the sanction levied against Chambers is substantial. But it is totally in line with the gravity of his misconduct.

His first act in response to this litigation was the perpetration of a deliberate and calculated fraud upon the district court. His every act thereafter was in aid of that initial fraud, and was designed to maintain its plausibility and to preserve the Public Records Doctrine defense that fraud created. The initial fraud indelibly taints the entirety of the proceedings below, rendering the defense on its face a sanctionable malefaction by litigants and lawyers alike.

Beyond that, the defense mounted by Chambers embodies a deliberate strategy of delay, harassment, and oppression. It was conceived in fraud and conducted thereafter in absolute bad faith. It was nothing less than a systematic and relentless assault upon the judiciary itself.

The sanction levied against Chambers comprises nothing more and nothing less than the expenses necessarily incurred as a direct and proximate result of Chambers' misconduct. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 133 (W.D. La. 1989), Petitioner's App., 28.

Every penny of the substantial fees and expenses incurred by NASCO was spent, and spent *necessarily*, in dismantling the edifice of fraud erected at Chambers' behest. But for the fraudulent sale and leaseback scheme, NASCO's claim for specific performance would have been amenable to summary disposition. Instead, NASCO faced the most effective war of attrition that money could buy.

Chambers pursued his tactics of delay with great tenacity and vigor. According to Gray's evidentiary submissions in the sanctions proceedings, Chambers had a host of lawyers (in addition to Gray, Boland, and McCabe)—one in Atlanta, three in Washington, and six in Lake Charles—all advising him on his strategies at various points in the course of the litigation. Pleading after pleading, raising issue after issue, rained down on NASCO's head. Those issues were not urged halfheartedly. They were pressed with all the skill and tenacity that Chambers' stable of lawyers could bring to bear. And in the context of this \$18 million lawsuit, NASCO had no choice but to take those volleys seriously, and to respond in earnest.

The scope, malignancy, and systematic character of Chambers' misconduct fully warrants an award of *all* attorneys' fees, costs, and expenses incurred by NASCO in the proceedings below. That sanction is nothing more than the cost directly generated by Chambers' fraudulent schemes. It is nothing more than what was necessary in order for NASCO to endure, and to prevail. Indeed, it is nothing more than the injury Chambers willingly sought to inflict on NASCO. Chambers' malefaction was total. It is only fitting that NASCO's recompense be total.

Thus, the sanction is tailored. And the fit is perfect. As this Court has noted, when "the very temple of justice has been defiled" by a fraud upon the court, "the entire cost of the proceedings could justly be assessed against the guilty parties." *Universal Oil Products Co. v. Root Ref'g Co.*, 328 U.S. 575, 580, 66 S. Ct. 1176, \_\_\_, 90 L. Ed. 1447, 1452 (1946). See also, *Unioil, Inc. v. E.F. Hutton Co., Inc.*, 809 F.2d 548, 557 (9th Cir. 1986); *Batson v. Neal Spelce Associates, Inc.*, 805 F.2d 546, 551 (5th Cir. 1986); *Eppes v. Snowden*, 656 F. Supp. 1267, 1281-82 (E.D. Ky. 1982); *Kendrick v. Zanides*, 609 F. Supp. 1162, 1170, 1172-73

(N.D. Cal. 1985) (*per* Schwarzer, J.).

Chambers would suggest that the sanction imposed in this case could not have been tailored because the proof submitted by NASCO at the evidentiary hearing was insufficient and could not be tested by the district court to ascertain whether it was related to Chambers' misconduct.<sup>8</sup>

NASCO submitted memoranda, affidavits, and itemized billing statements setting forth the fees and expenses incurred in conjunction with this litigation. NASCO's evidentiary submissions established that the

<sup>8</sup> Chambers suggests that the sanction should have been tested in accordance with the 12 factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and this Court's opinion in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

Those factors have no meaningful application in a sanctions case such as this one. Both *Johnson* and *Hensley* addressed attorneys' fees awards to prevailing plaintiffs in civil rights cases. The purpose of such awards is to assure that civil rights plaintiffs are able "to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition." *Johnson v. Georgia Highway Express, Inc.*, *supra*, 488 F.2d at 719-20. Obviously, that policy has little to do with the impetus behind the sanction awarded in this case.

In situations such as this one, where a litigant has tampered deliberately and relentlessly with the very machineries of justice, the court's response must necessarily focus on the vindication of the integrity of the system, on the deterrence of such misconduct in the future by similarly motivated litigants, as well as on the alleviation of the offense to private parties. Those *desiderata* necessarily imply a shift of the "reasonableness" focus away from an audit of the offended party's costs, and toward the gravity of the misconduct and the extent of the resources of the offender. See, e.g., *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 881 (5th Cir. 1988) (*en banc*). As Chambers himself has put it—a tailoring of the sanction to the gravity of the offense.

litigation costs awarded were billed and paid on an interim basis over the course of this litigation. Those submissions reflected the actual hours and actual funds expended in the prosecution of this claim. The hourly billing rates charged by counsel for NASCO were counsel's standard billing rates, and were entirely compatible with the rates charged by similar practitioners for similar work in their communities.

NASCO's evidentiary submissions were fully sufficient to establish, with particularity, the fees and expenses incurred, the services performed, and the hours consumed in the performance of those services. The detail provided was sufficient to permit the district court to determine the reasonableness of those fees and expenses, and the extent to which they should be included in any sanction awarded.

And that is precisely what the district court did. The district court found no fault with NASCO's evidence. The district court found no lack of detail. The district court found, as a matter of fact, that the sanction was reasonable in light of the gravity of the offense. And the district court was affirmed by the appellate court below. This Court does not sit to review on writ of certiorari the factual findings of lower federal courts. *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U.S. 175, 178, \_\_\_ S. Ct. \_\_\_, \_\_\_, 82 L. Ed. 1273, 1275 (1938).

### 3. Mitigation.

Chambers next suggests that NASCO failed to mitigate its expenses. A defense so frivolous as to warrant a *per curiam* affirmance from the bench at oral argument and the immediate imposition of sanctions, he argues, should not have required extensive efforts in the district court and should have been amenable to summary judgment.

That suggestion is simply disingenuous.

NASCO did not guilefully lie in wait, acquiescing in misconduct in order to build a claim for sanctions against an unsuspecting Chambers. To the contrary, NASCO's every effort was to expedite these proceedings, to cut through the tangled superfluity of collateral issues raised by Chambers, to get—finally—to the throat of the initial fraud and bring this matter to an end.

As a practical matter, the malignant purpose and lack of legal or factual foundation of pleadings cannot relieve an opponent of the necessity of responding seriously. Silence in the face of such abusive filings may invite disaster. It is incumbent upon the opponent of such pleadings to *demonstrate* their baselessness and malignancy to the tribunal that will ultimately rule upon them. And unless malignancy and baselessness are combined with total ineptitude, that can rarely be done without serious research and preparation. And Chambers and his counsel were not inept—at least not in that regard. Time and again, their filings raised issues of apparent merit, only to disintegrate when the cited authorities were examined. Throughout the course of this litigation, Chambers routinely placed the burden of that illumination on NASCO.

Chambers' suggestion that NASCO's failure to move for summary judgment demonstrates its failure to mitigate contains more rhetoric than reason.

The fact of the matter is that the fraudulent sale and leaseback scheme foreclosed any such summary disposition on the merits. But NASCO did move immediately to undo it. NASCO petitioned the district court on October 24, 1983—just days after the confection of that fraud—for a mandatory preliminary injunction *compelling* Mabel

Baker to "reconvey" the subject properties to CTR in order to restore the *status quo*. The district court chose a more conservative course—to issue a prohibitory preliminary injunction to preserve the altered *status quo* pending consideration of the merits of Chambers' Public Records Doctrine defense. That choice reflects the underlying factual question upon which NASCO's claim for specific performance would ultimately turn. Specific performance could be granted only if the bogus sale to Baker could be rescinded. That sale could be rescinded only if it was not real. And the reality, *vel non*, of that sale was purely and simply an issue of fact that would ultimately turn on the credibility of the parties to that transaction.

NASCO did not fail to mitigate its damages. It did what it had to do, and *only* what it had to do, in order to prevail.

#### 4. *Unconnected misconduct.*

Finally, Chambers suggests that the challenged sanction includes amounts attributable to misconduct unconnected with the proceedings at the district court.

In truth, that unconnected misconduct was not unconnected at all. It was part and parcel of Chambers' strategy of delay. The fees attributable to the proceedings before the FCC were fees incurred by NASCO in combating actions taken by Chambers in direct violation of the injunctive orders of the district court. The fees incurred in conjunction with the mandamus petition to the Fifth Circuit on the recusal motion (rejected as meritless by that court) were incurred in combating the most cynical and unseemly of attempts at manipulating the processes of justice. The fees incurred in responding to the writs and motions to stay the district court's judgment in the Fifth Circuit, and

before the Circuit Justice, were not included in the sanction imposed by the district court.

The fact of the matter is that the defense of this litigation was conceived in fraud and was conducted thereafter in absolute bad faith. All that happened was the direct and proximate result of that initial fraud. All of the fees incurred, and ultimately awarded, flowed directly from that fraud.

In the end, the district court was faced with the task of fashioning a sanction appropriate to the gravity of Chambers' misconduct. A sanction significant enough to deter Chambers, and to deter other powerful and wealthy litigants who might be tempted to bludgeon opponents into submission by converting a lawsuit into an extended act of systematic economic brutality.

The sanction fashioned by the district court, and affirmed by the appellate court below, was necessary and entirely appropriate to that task.

### CONCLUSION

This case does not warrant review on writ of certiorari.

As a litigant in federal court, Chambers was duty bound to litigate in good faith, to deal honestly with the court, to yield to the orderly processes of justice. He breached those duties, choosing instead to embrace deception, fraud, and outright falsehood as the tools of litigation. The judicial system can neither tolerate nor long survive conduct so deviant from acceptable standards.

Chambers' misconduct, unparalleled in reported

federal decisions, brought down upon him a heavy sanction, indeed. A sanction calculated to impress him and to deter him from future abuses. A sanction designed to deter other litigants of similar wealth, arrogance, and determination who might be tempted to utilize similar tactics of deception, fraud, and falsehood. A sanction that was both fitting and appropriate.

The district court's inherent power to impose such sanctions in vindication of its authority does not implicate the *Erie* Doctrine. State policies governing the availability of substantive remedies cannot be permitted to impair a federal district court's ability to protect itself.

The court's constitutional obligation to preserve the integrity and sanctity of the judicial process is best fulfilled by visiting appropriate wages upon those who would labor to abuse it. The instant sanction does just that.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, David L. Hoskins, a member of the Bar of this Court, hereby certify that, as counsel for the plaintiff-respondent, I received a copy of the Petition For Writ of Certiorari on August 6, 1990, and that three copies of the Respondent's Brief in Opposition to Petition For Writ of Certiorari were mailed, first class postage prepaid, to Mr. Mack E. Barham and Mr. Russell T. Tritico, counsel for the petitioner. I further certify that all parties required to be served have been served.

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